FILED
JUL 23 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER, 1943, TERM.

No. 196

WILLIE GRAY GARRISON, PETITIONER,
VS.
UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

D. B. HOLMES,
BEN F. CAMERON,
LESTER E. WILLS,
Meridian, Mississippi,
Attorneys for Petitioner.

TABLE OF CASES

Petition for Certiorari

Summary Statement 1
Opinion Below 4
Jurisdictional Statement 4
Questions Presented 5
Reasons for Allowance of Writ 7
Prayer 8

Brief in Support of Petition

Statement of Facts 9
Summary of Argument 14

Argument—

New Trial 17
Decisions of Supreme Court 19
Federal Statutes 21
Circuit Court of Appeals Decisions 23
Fifth Circuit Court of Appeals Cases 26
Right to Have Law Correctly Stated 28

Conclusion 29

TABLE OF CASES

Ash vs. Ash, Comberback 357 ..... 14, 18
Barker vs. Dixie, 2 Strange 1051 ..... 14, 18
Bates vs. United States, 269 Fed. 563 ..... 15, 25
Beaton vs. United States, 5 F. 2d 966 ..... 15, 26
Bernal vs. United States, 241 Fed. 339 ..... 16, 26
Bradley vs. United States, 264 Fed. 79 ..... 16, 27
Bright vs. Eynon, 1 Burrow 390 ..... 14, 19
Brown vs. United States, 9 F. 2d 588 ..... 15, 26
Casey vs. United States, (9 Cir.) 20 F. 2d 752 ..... 16, 27, 28

Commonwealth vs. Rollins, 242 Mass. 427, 136 N. E. 360 ..... 14, 17
Coplin vs. United States, (9 Cir.) 88 F. 2d 652 ..... 16, 28
Detroit United Ry. Co. vs. Craven, 13 F. 2d 352 ..... 15, 23
Ex parte United States, (7 Cir.) 101 Fed. 870, 131 A. L. R. 176 ..... 16, 28
Gibson vs. Hunter, 2 H. Blackstone 187 (House of Lords, 1793) 19
Harrison vs. United States, 7 F. 2d 259, 262 ..... 15, 23
Haws vs. Victoria Copper Mining Co., 160 U. S. 303, 313 ..... 14, 19
Hendrix vs. United States, 219 U. S. 79, 91 ..... 14, 20
Holmgren vs. United States, 217 U. S. 509, 521 ..... 14, 20
Hyde vs. United States, 225 U. S. 347, 391 ..... 14, 21
Jones vs. Spencer, 77 L. T. R. 536 ..... 14, 20
Jordan vs. United States, 120 F. 2d 65 ..... 16, 27
Katz vs. United States, 273 Fed. 157 ..... 15, 23
Lopez vs. United States, 17 F. 2d 462 ..... 15, 23
Mattox vs. United States, 146 U. S. 140 ..... 14, 17
Mattox vs. United States, 146 U. S. 919 ..... 14, 19, 27
McDonald vs. Pless, 238 U. S. 264, 268 ..... 14, 20
Murhard Estate Co. vs. Portland, Seattle Ry. Co., 163 Fed. 194 ..... 15, 26
Ogden vs. United States, 112 Fed. 523 ..... 15, 24
Paine vs. St. Paul Union Stockyard Co., 35 F. 2d 624 ..... 15, 26
Prisament vs. United States, 96 F. 2d 865 ..... 16, 27
Pugh vs. Bluff City Excursion Co., 177 Fed. 399 ..... 15, 25
Rex vs. Francis, 2 Strange 1015 ..... 14, 19
Shannon vs. Shaeffer Oil and Refining Co., 51 F. 2d 878 ..... 15, 26
Slade's Case, Style 138 ..... 14, 18
Smith vs. United States, 231 Fed. 25 ..... 15, 26
Smith vs. United States, 281 Fed. 696 ..... 15, 24
Spreckels vs. Brown, 212 U. S. 208, 215 ..... 14, 20
State vs. Messino, 325 Mo. 743, 30 S. W. 2d 750, 755 ..... 14, 17
Stokes vs. United States, 93 F. 2d 744 ..... 16, 27
Sulzbacher vs. Continental Casualty Co., 88 F. 2d 122 ..... 15, 26
Tate vs. Baugh, 264 Fed. 892 ..... 15, 25

Towe vs. United States, 238 Fed. 557 ..... 15, 24
United States vs. Glasser, (7 Cir.) 116 F. 2d 690, reversed in part Glasser vs. United States, 315 U. S. 60 ..... 16, 28
Wood vs. Guston, Style 466 ..... 14, 18
Woodford vs. Eades, 1 Strange 425 ..... 14, 18

STATUTES

Act of January 31, 1928 (28 U. S. C. A. 861a) 14, 22
Constitution of United States, Amendment Six 16
Criminal Code, Section 19 (18 U. S. C. A. 51) 1, 2, 8, 9, 10, 13
Criminal Code, Section 37 (18 U. S. C. A. 88) 2, 8
Criminal Code, Sections 19 to 21 (18 U. S. C. A. 51, 52, 54) 8
Judicial Code, Section 240, as amended by Act of February 13, 1925, Subsection (a) (28 U. S. C. A. 347) 4, 5
Judicial Code, Section 269, formerly R. S., Sec. 726 (28 U. S. C. A. 391) 5, 6, 14, 17, 20, 21
Rules of Criminal Procedure, Rule 11 4
Supreme Court Rules, Rule XXXVIII 4

Supreme Court of the United States

OCTOBER, 1943, TERM.

No. .....

WILLIE GRAY GARRISON, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, Willie Gray Garrison, respectfully prays that a writ of certiorari issue from this Honorable Court to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, rendered on the 28th day of May, 1943.

SUMMARY STATEMENT.

Petitioner and another were convicted in the Western Division of the Northern District of Alabama on one of two counts, each of which charged one and the same conspiracy under Section 19 of the Criminal Code (18 U. S. C. A. 51). The indictment was drawn on the erroneous assumption that an overt act was a necessary element of the offense. In charging the jury, the trial court fell into this same error, and also erroneously charged that the object of the conspiracy, as charged in the indictment,

was an offense against the United States, obviously confusing the offense denounced by Criminal Code, Section 19, with the offense defined by Criminal Code, Section 37 (18 U. S. C. A. 88), and assuming that some section of the Criminal Code denounced the commission of the acts which might be the objects of criminal conspiracies under Section 19. Moreover, the court charged the jury that:

> "The question for you to determine is, did these defendants, or either of them, oppress or threaten or intimidate Mr. Dorough because of his having reported the activities of the defendant (petitioner) in the whiskey business,"

thereby authorizing the jury to convict if they found that the overt act charged in the indictment, which was also the object of the alleged conspiracy, had actually been committed, without regard to whether or not the defendants had conspired.

Insofar as the two counts charged violation of Section 19, they were identical. Unnecessary and superfluous allegations follow the conspiracy charge in each count, alleging the commission of different overt acts, and this was the only difference between the counts. Although each count charged the same conspiracy, both counts were submitted to the jury under the charge mentioned above. The jury convicted as to Count One, but acquitted as to Count Two. Since the offense charged in each count was one and the same, the jury must have taken the court at its word, and considered whether or not the defendants had oppressed, etc., Dorough for the reasons stated, and must have found that they did so oppress as charged in Count One, but did not oppress as charged in Count Two. Under this, the only consistent interpretation of the record, the jury acquitted as to the conspiracy, which was the only offense charged in the indictment.

On appeal, petitioner brought forward his motion for a directed verdict on the insufficiency of the evidence.

The Court of Appeals found that there was some evidence, under the wide latitude allowed in conspiracy cases, and stated that

> "The circumstances convinced the jury that there was concert of action and community of purpose,"

and thereupon affirmed the conviction, one Judge dissenting on the ground that there was no evidence of conspiracy.

On Petition for Rehearing, petitioner renewed his Motion for New Trial, as filed in the trial court, and urged that the verdict was the result of a mistake of law which had pervaded the entire proceeding. That the Court of Appeals fell into the same error as the trial court is evidenced by the following quotation from its opinion:

> "There was evidence in the record, which the jury evidently believed, upon which it could find that there was an understanding and concert of action between Garrison and Walker, and there is ample evidence of the commission by Garrison of the overt act alleged in the first count. The act of one of the conspirators is the act of all."

The Court of Appeals took no notice of the renewal of the Motion for a New Trial, but overuled the Petition for Rehearing. Therefore, there is open for consideration by this court, the question of whether the Motion for New Trial was open for consideration by the Court of Appeals on questions of law. There are also questions as to whether or not the motion has been acted upon by the Court of Appeals, and what disposition of the cause a proper consideration of the motion would require.

As shown by the majority and minority opinions, the evidence of conspiracy was either very slight, or completely nonexistent. Petitioner contends that the trial court should have directed an acquittal, and that the Court of Appeals was in error in not reversing on this ground.

An essential allegation of the indictment was that Dorough was a citizen of the United States. While some

witnesses testified as to his place of residence, the court erroneously charged that the evidence showed that Dorough was a citizen of the United States.

OPINION BELOW.

The opinions of the court have not yet been reported, but are set out in the Record (R. 152 *et seq.*). No opinions were filed to explain the action of the Court of Appeals in overruling the Petition for Rehearing and Motion for New Trial (Original Certified Record 175).

JURISDICTIONAL STATEMENT.

Within the time allowed by Rule 11 of the Rules of Criminal Procedure in United States Courts, petitioner invokes the jurisdiction of this court under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Subsection (a) (28 U. S. C. A. 347), and Rule XXXVIII of the Rules of the Supreme Court of the United States, adopted February 12, 1939.

Petitioner was found guilty by the jury on November 4, 1942 (R. 11). Thereupon he was sentenced and judgment was entered on November 6, 1942 (R. 12). On the same day, Notice of Appeal was filed (R. 120). Within the extended time (R. 16), petitioner filed his Bill of Exceptions (R. 119), and the Transcript of Record was filed in the Circuit Court of Appeals for the Fifth Circuit on February 3, 1943 (R. [illegible]). Thereafter, the cause was submitted to said court on the record and briefs on May 12, 1943 (R. 151), and on May 28, 1943, the judgment of the District Court was affirmed (Original Certified Record 152, 157). Petitions for rehearing were filed by petitioner's original attorney (Original Certified Record 158) and by newly employed attorneys (Original Certified Record 162) on June 16, and June 18, 1943, respectively, all within the time allowed for filing such petitions by Rule 29 of

the Rules of the United States Circuit Court of Appeals for the Fifth Circuit.

On June 25, 1943, the Court of Appeals overruled the petitions for rehearing (Original Certified Record 175), and on the same date entered its order (Original Certified Record 176) staying the issuance of mandate for thirty days to allow petitioner to file this petition to this court. Attention is called to the fact that it is immaterial whether the order of the Court of Appeals overruling the Petition for Rehearing had the effect of overruling the Motion for New Trial, since this court may grant the writ either before or after judgment or decree of the Court of Appeals. Judicial Code, Section 240 (28 U. S. C. A. 347).

QUESTIONS PRESENTED.

1. Whether or not Judicial Code, Section 269, formerly R. S., Sec. 726 (28 U. S. C. A. 391), authorizes the filing of a motion for a new trial in the Circuit Court of Appeals in a case tried in the District Court, where the reasons assigned on such motion present questions of law, or demonstrate that the trial and all subsequent proceedings were had on an erroneous theory of law.

2. Whether or not the grant or refusal by the trial court of a motion for a new trial rests solely in the discretion of the court and can not be reviewed by the Appellate Court, even on questions of law, except for abuse of discretion.

3. Whether or not, after a trial, proceedings subsequent to trial in the trial court, including motion for a new trial; and the consideration of the case on appeal, the entire proceeding having been conducted on a mistaken theory of law, and the mistake not appearing to be prejudicial to appellant until the Appellate Court stated its reasons for affirming; appellant may move in the Appellate Court for a new trial, renewing the grounds alleged in the trial court and adding thereto the ground based upon the mistake of law.

4. Whether or not the various United States Circuit Courts of Appeals (and the Supreme Court of the United States) are "United States Courts" within the meaning of the first sentence of Judicial Code, Section 269 (18 U. S. C. A. 391), which provides that, "All United States Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law."

5. Whether or not "Courts of Law" as used in Judicial Code, Section 269 (18 U. S. C. A. 391), includes the Court of the Kings Bench as it was organized and existed on September 24, 1789, whether sitting at *nisi prius*, at bar or *en banc;* and whether or not the organization of the United States District Courts and Circuit Courts of Appeals is analogous to the Court of the Kings Bench in the handling of criminal cases, in that the power to grant new trials is preserved on appeal to the same extent as if the legal questions presented by the record had been reserved by the trial court at *nisi prius* or on application for a *venire facias de novo.*

6. Whether or not the Circuit Court of Appeals for the Fifth Circuit committed error in refusing to entertain petitioner's motion for a new trial, either as presented in the District Court, on the record on appeal, or as renewed in the Appellate Court on a new motion adopting the grounds of the motion already of record and raising questions of law, or new matter tending to show that petitioner had not been properly convicted.

7. Whether or not the jury which returned a verdict against petitioner can be said to have convicted him for any offense denounced by the United States Criminal Code, the court having instructed that the question for the jury to consider was whether or not petitioner had committed certain acts which did not constitute any offense against the United States.

8. Whether or not, under all the facts presented by the record and the legal propositions arising therefrom, petitioner was entitled to a new trial.

9. Whether or not the court below committed error in affirming the conviction of petitioner in the District Court.

10. Whether or not the affirmance of a conviction upon slight evidence can stand when it appears that a mistake of law pervaded the trial and raises doubts as to whether or not the jury actually found the defendant guilty of the offense charged in the indictment.

REASONS FOR ALLOWANCE OF WRIT.

1. The Circuit Court of Appeals, in not passing upon the action of the trial court in overruling the Motion for a New Trial, and in not entertaining the motion filed with it, deferred passing upon the procedural questions concerning motions for new trials as to which:

A. The decisions of this court are not clear, require re-examination, or do not cover the questions here involved.

B. There is an apparent conflict in the decisions rendered by the various Circuit Courts of Appeals.

C. There is an apparent divergence of views held by the judges of the Fifth Circuit Court of Appeals, under which that court does not rely upon its former decisions.

2. The course and conduct of the trial, conviction, and affirmance of the judgment under which this petitioner has been condemned is in violation of the Sixth Amendment to the Constitution of the United States, in that the jury was not properly charged by the court as to the law applicable, but was permitted to convict for conduct not amounting to an offense against the United States.

3. There being fundamental differences between the offense denounced by Criminal Code, Section 19 (18 U. S. C. A. 51), and those defined by Criminal Code, Section 37 (18 U. S. C. A. 88), and no decision of this court as to the quantity and quality of evidence necessary to sustain a conviction, under the former section; so that lower courts are compelled to look to the decisions under the latter section for analogous rulings; this court should consider the sufficiency of the evidence on this record to sustain a conviction under the Criminal Code Section under which the indictment was returned.

4. The questions raised and to be raised on this petition are believed to be of great national importance, and especially so in view of the expansion of rights enjoyed by citizens under Federal Law, which may be protected in the United States Courts only by prosecutions under Criminal Code, Sections 19 to 21 (18 U. S. C. A. 51, 52 54).

PRAYER.

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and proceedings in said court had in Cause Number 10506 on the docket of said court, entitled *Willie Gray Garrison, Appellant,* v. *United States of America, Appellee,* to the end that said cause may be reviewed and determined as provided by the statutes of the United States and the Rules of this court; and that the judgment of the Circuit Court of Appeals entered therein be reversed, and for such other relief as law and the due and proper administration of justice shall demand.

Willie Gray Garrison,
Petitioner.

By D. B. HOLMES,
BEN F. CAMERON,
LESTER E. WILLS,
Meridian, Mississippi,
Counsel for Petitioner.